

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs September 24, 2008

**FRANKLIN JEWEL EALEY v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Knox County**  
**No. 85341     Kenneth R. Irvine, Jr., Judge**

---

**No. E2008-00583-CCA-R3-PC - Filed October 14, 2008**

---

The Petitioner, Franklin Jewel Ealey, appeals from the Knox County Criminal Court's order dismissing his petition for post-conviction relief. He argues that the dismissal was erroneous because, prior to pleading guilty to one count of attempt to obtain a controlled substance by fraud and two counts of theft, he did not receive the effective assistance of counsel and, therefore, his plea was entered involuntarily. His argument centers around his contention that he believed he was to receive an alternative sentence in exchange for his guilty plea. Following our review of the record and the parties' briefs, we conclude that the Petitioner has not demonstrated that trial counsel was constitutionally ineffective or that his plea was involuntary. Consequently, we affirm the post-conviction court's order of dismissal.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

DAVID H. WELLES, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JERRY L. SMITH, J., joined.

Albert J. Newman, Jr., Knoxville, Tennessee, for the appellant, Franklin Jewel Ealey.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; Randall Nichols, District Attorney General; and Zane Scarlett, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**Factual Background**

According to the facts gleaned from the record, on November 18, 2001, the then fifty-year-old Petitioner presented a forged prescription for Lortab to a CVS pharmacy. The Petitioner also stole approximately \$1,300-worth of black leather jackets from a Kohl's department store on January 27, 2004, and \$800-worth of clothing merchandise from a Proffitt's department store on March 12, 2004. On May 17, 2006, the Petitioner pleaded guilty to attempt to obtain a controlled substance by

fraud (case number 77561), Class D felony theft (case number 79934), and Class E felony theft (case number 79800). See Tenn. Code Ann. §§ 39-14-103, 39-14-105, 53-11-402.<sup>1</sup>

Pursuant to the plea agreement, the Petitioner received terms of six years, four years, and two years respectively, to be served at 35% as a Range II, multiple offender. The plea agreement provided that all sentences were to be served consecutively, for a total effective sentence of twelve years, with the manner of service of the sentence to be determined by the trial court. Following a sentencing hearing, the trial court denied any form of alternative sentencing and ordered the Defendant to serve his sentence in the Department of Correction.

The Petitioner filed a timely pro se petition for post-conviction relief. Post-conviction counsel was appointed, and an amended petition was filed. In his amended petition, the Petitioner asserted that his trial counsel was constitutionally ineffective because counsel failed to interview witnesses and discuss the case and any possible defense with him. He further challenged the voluntariness of his plea contending that, despite a promise from trial counsel to do so, counsel failed to make an application to the trial court for an alternative sentence. Subsequently, the post-conviction court held a hearing at which only the Petitioner and trial counsel testified.

The Petitioner testified that trial counsel periodically came to the jail to talk with him about the case. The Petitioner informed trial counsel of his innocence on the forged prescription charge, but trial counsel failed to request discovery. When asked why he pleaded guilty to the forged prescription charge, he replied that, based upon the information he received from trial counsel, he believed all three charges were to be served concurrently and that he would receive an alternative sentence. Had he known that probation was not guaranteed, he would not have pleaded guilty and would have proceeded to trial on all three charges.

He claimed that the probation department recommended that he be referred to some type of alternative sentencing program. However, according to the Petitioner, trial counsel never applied for an alternative sentence.

On cross-examination, the Petitioner affirmed that he believed that he would receive an eight-year sentence under the terms of the plea agreement. He claimed that the trial court did not go over the plea agreement with him, that he did not remember signing the plea papers, and that trial counsel did not explain the plea agreement and resulting sentences to him. The Petitioner claimed that trial counsel was “collaborating for the State” and that he asked him to withdraw as counsel. He did recall speaking with probation officers for preparation of the sentencing report. One of the probation officers, according to the Petitioner, recommended him for an alternative sentence of community housing and placement in a drug treatment program.

He acknowledged that he had received some drug treatment while incarcerated. Further, he admitted that he did not, at any time during the plea and sentencing process, express his

---

<sup>1</sup> Copies of the judgment forms are not included in the record.

dissatisfaction with trial counsel. According to the Petitioner, trial counsel placed his probation application on a courtroom table, left it there, and sat with his back against a wall, while the Petitioner was escorted from the courtroom.

Trial counsel then testified and refuted the Petitioner's allegations. Trial counsel testified that he visited the Petitioner in jail approximately three or four times to discuss the case. Trial counsel conveyed to the Petitioner that, if they proceeded to trial on the prescription charge, the Petitioner's credibility would be an issue due to his criminal record. The talks then turned to plea negotiations; the State offered eight years to serve or twelve years and the Petitioner could seek an alternative sentence. When asked if he assured the Petitioner that he would receive probation, counsel responded that he did not and that he recommended, based upon the Petitioner's record, that the Petitioner accept the eight years to serve. Counsel stated that he explained the consecutive nature of the Petitioner's sentences and that the Petitioner understood this explanation.

Trial counsel relayed that he made an application for probation after the Petitioner pleaded guilty, which was rejected. When asked if anyone recommended the Petitioner for probation, counsel responded in the negative and that the Petitioner was mistaken if he believed otherwise.

On cross-examination by the State, several letters written by trial counsel were entered into evidence. In one letter, trial counsel relayed a plea offer, as a Range II, multiple offender, to the Petitioner of ten years to serve or sixteen years and the Petitioner could apply for an alternative sentence. Trial counsel explicitly stated that the Petitioner's sentences were to be served consecutively. In another letter, trial counsel expressed the offer of eight years to serve as a Range I, standard offender. Trial counsel advised that it was unlikely the Petitioner would be placed on probation due to his prior record.

Trial counsel testified that the Petitioner made bond prior to his sentencing hearing. The plan was for the Petitioner to obtain employment and drug treatment. Thereafter, the Petitioner failed to appear in court, and his bond was forfeited.

Once the Petitioner was apprehended, he chose to take the greater amount of time and apply for probation. Trial counsel confirmed that the Petitioner was instructed that he was not guaranteed probation.

Trial counsel testified that he sought probation for the Petitioner but that the trial court denied this request. Trial counsel stated that no officer of the enhanced probation or community alternatives to prison programs recommended the Petitioner for placement in an alternative sentencing program. Documents were entered reflecting this information. Also, the transcripts of the plea and sentencing hearings were entered as exhibits at the post-conviction hearing, showing that the Petitioner was advised of the consecutive nature of his sentences and that trial counsel applied for probation.

After hearing the evidence presented, the post-conviction court denied relief, reasoning as follows:

What is before the Court is the transcript of both the sentencing hearing and the plea hearing where you came in this court and pled guilty. Also, I have the files from prior cases, which I've reviewed, and it is in numerous places that it's a 12-year sentence. It was in the plea paperwork that you signed, that you signed here in the courtroom. Judge Jenkins went over and mentioned several times that it was an effective sentence of 12 years, that the three were consecutive.

And it was clear that you were applying for probation. And contrary to the allegations in your petition, you did apply and were not only considered for regular probation, but you were considered for Enhanced Probation and then considered for Community Alternatives to Prison Program and were considered a high risk by the state probation—regular state probation. You were not recommended for Enhanced Probation and you were not recommended for CAPP.

. . . .

In reviewing your other allegations, that [trial counsel] did not properly pursue—didn't do anything to get you onto probation, the sentencing hearing reflects otherwise. That [trial counsel] had an opportunity and he made a request of the [c]ourt that you be placed on some type of treatment, get something besides prison time. He did, in fact, argue that and requested that of Judge Jenkins, and Judge Jenkins, looking at the entire file, ruled against that. So—contrary to what you allege.

It is clear that I am going to credit the transcripts of the two hearings, I'm going to credit the testimony of [trial counsel] and find that you are mistaken about your recollection on most of the key issues, and that it was made clear to you that this was an effective 12-year sentence; that you would be applying for probation, but that there was not a guarantee; and that, in fact, probation, several different types, was considered but rejected by the [c]ourt and—with sound reason. That [trial counsel] made every effort to have you considered for every form of alternative sentencing that was available, and then, still, even when they recommended against you, that he made a pitch to the [c]ourt. He was just unsuccessful. That's not ineffective assistance on his part; that's just a function of the fact that you have a very lengthy record and a poor history of supervision.

So it will be the ruling of the Court that your post-conviction [petition] is to be denied because you have failed to prove that your plea was not knowing, intelligent, and voluntary, nor was there any ineffective assistance by your lawyer.

An order was entered to this effect on March 24, 2008. This appeal followed.

## ANALYSIS

On appeal, the Petitioner argues that trial counsel was constitutionally ineffective and that his plea was involuntary. While unclear, the crux of his argument is that he only pleaded guilty because he believed, according to the declarations of trial counsel, that he was to be placed on probation and get treatment for his drug problem. There is also some reference to the allegation that the Petitioner did not understand the consecutive nature of his sentences.

To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not reweigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The post-conviction judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to “reasonably effective” assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

This two-part standard of measuring ineffective assistance of counsel also applies to claims arising out of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58 (1985). The prejudice component is modified such that the defendant “must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.” Id. at 59; see also Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. "However, a trial court's conclusions of law—such as whether counsel's performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Id. (emphasis in original).

Regarding the voluntariness of his pleas, when a guilty plea is entered, a defendant waives certain constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront witnesses. Boykin v. Alabama, 395 U.S. 238, 243 (1969). "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." Id. at 242. Thus, in order to pass constitutional muster, a guilty plea must be voluntarily, understandingly, and intelligently entered. See id. at 243 n.5; Brady v. United States, 397 U.S. 742, 747 n.4 (1970). To ensure that a guilty plea is so entered, a trial court must "canvass[] the matter with the accused to make sure he [or she] has a full understanding of what the plea connotes and of its consequence[s]." Boykin, 395 U.S. at 244. The waiver of constitutional rights will not be presumed from a silent record. Id. at 243.

In State v. Mackey, 553 S.W.2d 337 (Tenn. 1977), the Tennessee Supreme Court set forth the procedure for trial courts to follow in Tennessee when accepting guilty pleas. Id. at 341. Prior to accepting a guilty plea, the trial court must address the defendant personally in open court, inform the defendant of the consequences of a guilty plea, and determine whether the defendant understands those consequences. See id.; Tenn. R. Crim. P. 11. A verbatim record of the guilty plea proceedings must be made and must include, without limitation, "(a) the court's advice to the defendant, (b) the inquiry into the voluntariness of the plea including any plea agreement and into the defendant's understanding of the consequences of his entering a plea of guilty, and (c) the inquiry into the accuracy of a guilty plea." Mackey, 553 S.W.2d at 341.

However, a trial court's failure to follow the procedure mandated by Mackey does not necessarily entitle the defendant to seek post-conviction relief. See State v. Prince, 781 S.W.2d 846,

853 (Tenn. 1989). Only if the violation of the advice litany required by Mackey or Tennessee Rule of Criminal Procedure 11 is linked to a specified constitutional right is the challenge to the plea cognizable in post-conviction proceedings. See Bryan v. State, 848 S.W.2d 72, 75 (Tenn. Crim. App. 1992). “Whether the additional requirements of Mackey were met is not a constitutional issue and cannot be asserted collaterally.” Johnson v. State, 834 S.W.2d 922, 925 (Tenn. 1992).

After hearing the testimony of the Petitioner and trial counsel at the evidentiary hearing, the post-conviction court found trial counsel to be more credible. We do not revisit the issue of credibility on appeal; we defer to the post-conviction court’s ruling in that regard. Momon, 18 S.W.3d at 156. Moreover, the record supports the post-conviction court’s findings on the issue.

It is clear from the record before this Court that the consecutive nature of the Petitioner’s sentences was explained to him at the guilty plea hearing and by trial counsel. The guilty plea transcript reveals that the trial judge carefully reviewed the rights that the Petitioner was waiving and confirms that the Petitioner responded appropriately to questions. The transcript of the guilty plea hearing also reflects that the Petitioner’s sentences were explained to him, including that the sentences would be served consecutively and that he would be applying for an alternative sentence. Trial counsel was adamant that he explained the plea agreement to the Petitioner, and letters were entered into evidence corroborating this testimony. Furthermore, the sentencing hearing reflects that trial counsel did apply for an alternative sentence on the Petitioner’s behalf but that the trial court denied this request.

First, the record, including this Court’s review of the transcript from the Petitioner’s guilty plea hearing, supports the post-conviction court’s finding that the Petitioner knowingly and voluntarily pleaded guilty. Next, we conclude that the Petitioner has failed to prove by clear and convincing evidence that trial counsel’s representation constituted deficient performance. He has failed to show prejudice because he did not establish that, but for trial counsel’s alleged errors, he would have proceeded to trial. In sum, the Petitioner has failed to show ineffective assistance of counsel.

### **CONCLUSION**

Based upon the foregoing, we conclude that the post-conviction court did not err by dismissing the petition for post-conviction relief. Accordingly, the order of dismissal is affirmed.

---

DAVID H. WELLES, JUDGE